INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of Case	3
Reasons for Granting the Writ	5
Conclusion	12
Appendix A—Opinion of the District Court	13
Appendix B—Judgment of District Court	23
Appendix C—Original Opinion of the Court of Appeals	24
Appendix D—Judgment of Court of Appeals	29
Appendix E—Supplemental Opinion of Court of Appeals	30
Appendix F—Judgment of Court of Appeals Based on Supplemental Opinion	33
Appendix G—Modifying Judgment of Court of Appeals	34
Appendix H—Order Denying Petition for Rehearing	35

CITATIONS

CASES: PAGE

Amos v. *Commissioner*, 43 T. C. 50 (1964) 11

Armstrong v. *United States*, 354 F. 2d 274, 290 (1965) 10

Commissioner v. *Sunnen*, 333 U. S. 591, 599, 601 (1948) 6, 7, 8

Fairmount Aluminum Co. v. *Commissioner*, 222 F. 2d 622, 625 (4th Cir. 1955) cert. den. 350 U. S. 838 (1955) 6

Ginsberg's Estate v. *Commissioner*, 271 F. 2d 511 (5th Cir. 1959) 9

Helvering v. *Mitchell*, 303 U. S. 391 (1938) 10

William Hendrick, 1961—308 T. C. Memo 9

Stagecrafter's Club Inc., v. *District of Columbia Division of American Legion*, 111 F. Supp. 127 (D. D. C. 1953) 9

United States v. *Glidden Co.*, 119 F. 2d 235, 244-245 (6th Cir. 1941) 9

United States v. *Scharton*, 285 U. S. 518, (1932) 8

Leroy B. Williams, 1955—325 T. C. Memo 9

STATUTES:

Internal Revenue Code of 1954:

Sec. 6653 (26 U. S. C., 1958 ed. Sec. 6653) 8

Sec. 7201 (16 U. S. C., 1958 ed. Sec. 7201) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. .....

JEROME H. MOORE AND
MILDRED V. MOORE

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Jerome H. Moore and Mildred V. Moore, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit, affirming in part and reversing in part the Judgment of the United States District Court for the Western District of Virginia, holding that the United States Government is not collaterally estopped from asserting revised tax liabilities of the petitioners by reason of a prior stipulation as to the amount of tax owed by them and that Jerome H. Moore is collaterally estopped from denying liability for civil penalties under the Internal Revenue Code by his previous criminal conviction under a different section of that Code.

OPINIONS BELOW

The opinion and subsequent modification of opinion of the Court of Appeals (Appendices C & E) have been officially reported at 360 F. 2d 353. The opinion of the District Court has been officially reported at 235 F. Supp. 387 (Appendix A).

JURISDICTION

The opinion of the Court of Appeals was entered on December 7, 1965, and was modified by an opinion entered April 29, 1966. The Government's Petition for Rehearing with respect to this supplemental opinion was denied June 22, 1966.

QUESTIONS PRESENTED

(1) Is the United States Government bound in subsequent civil proceedings by an unrestricted stipulation prepared by it and agreed to by the taxpayer establishing the amount of his taxable income in connection with criminal prosecution under Section 7210 of the Internal Revenue Code?

(2) Should the doctrine of collateral estoppel be limited so as not to bind a taxpayer to liability for civil penalties for "fraud" because of his prior conviction of "attempting to evade or defeat a tax", the two statutes not being *in pari materia*, as determined by this Honorable Court?

STATUTES INVOLVED

Internal Revenue Code of 1954:
Sec. 6653 Failure to Pay Tax

* * *

(b) FRAUD:—If any part of any underpayment

(as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to that tax an amount equal to 50% of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

* * *

(26 U.S.C. 1958 Ed. Sec. 6653)

Sec. 7201 Attempt to Evade or Defeat Tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution.

(26 U. S. C. 1958 Ed. Sec. 7201)

STATEMENT

This concerns the liability for income taxes of Jerome H. Moore and Mildred V. Moore, his wife, resulting from their filing joint returns for the calendar years 1955 through 1958. An audit of these returns resulted in the prosecution and conviction of Jerome H. Moore for willfully attempting to evade and defeat income taxes for these years. While the audit was in progress and all his records in the possession of the Government Agents, the Moores filed amended returns for these years and paid the additional tax shown thereon.

In the ensuing criminal proceedings and before the taxpayers' records were returned to them, the Government prepared and secured Mr. Moore's agreement to a stipulation as to the precise dollar amount of their income and the tax thereon for each of these years. This stipulation, which was not restricted in any way as to

its scope or use, was filed in the criminal proceedings. No evidence of any other or different amounts of income was submitted by either party in that proceeding.

Taxpayers thereupon filed claims for refund of the excess amounts paid by them over the amounts of tax which they had been stipulated as owing. When these claims were not acted on within six months, this suit was brought in the United States District Court for the Western District of Virginia. The Government then counterclaimed and alleged a different amount of tax liability (in excess even of the amounts shown on the amended returns) and also asked for civil fraud penalties.

In the District Court proceedings, the taxpayers submitted the stipulation of their taxable income previously filed and contended they could not have more than one true taxable income for any particular year. The Government submitted proof of Mr. Moore's criminal conviction of attempting to defeat and evade income taxes and contended this conclusively established their liability for the civil fraud penalty. The District Judge rejected both contentions, holding that the Government was not bound by its stipulation of taxpayers' income and that proof of Mr. Moore's conviction by itself did not establish their liability for civil fraud penalties. Both parties appealed this decision to the United States Court of Appeals for the Fourth Circuit.

That court affirmed the decision as to the non-binding nature of the stipulation, but reversed the holding as to collateral estoppel, stating that Mr. Moore's criminal conviction for attempting to evade and defeat a tax barred them absolutely from contesting their liability for civil penalties for fraud. Thereafter, on its own motion, the Court modified this decision to restrict the effect of this collateral estoppel to Mr. Moore's liability and to

give Mrs. Moore the opportunity to have her liability for the civil penalties litigated, since she had not been a formal party to the criminal proceeding.

Taxpayers contend the Court of Appeals erred in holding the Government was not bound, as any other litigant would be, by its stipulation of a fact without proof of which it could not have prevailed in the prior proceedings and in holding that Mr. Moore's conviction under one statute collaterally estopped him from contesting his liability under another statute, where this Court has held the two statutes did not have the same meaning.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I

A STIPULATION OF A TAXPAYER'S TAXABLE INCOME, PREPARED, INTRODUCED INTO EVIDENCE AND SUPPORTED BY COLLATERAL PROOF BY THE GOVERNMENT WITHOUT LIMITATION OR QUALIFICATION AS TO ITS EFFECT OR USE, IS BINDING ON THE GOVERNMENT IN A SUBSEQUENT PROCEEDING BETWEEN THE SAME PARTIES FOR THE SAME TAX PERIOD.

In prior criminal litigation, brought under Section 7210 of the Internal Revenue Code, the Government presented unequivocably what it concluded, after a year and one-half of inquiry, to be the taxable income of the taxpayers for the four years in question, and in good faith the taxpayers agreed to this stipulation. At no point during the criminal proceedings did the Government assert any qualifications or limitations to the stipulation; rather it con-

tinued to assert what it had determined (and figures to which the taxpayers had in good faith agreed) was their net taxable income for the years in question. Subsequently, the taxpayers attempted to rely on this stipulation as a basis for a refund claim, but the Government announced that it had arrived at a new determination of their net taxable income for the same period of time. Both the District Court and the Court of Appeals have erroneously held that the Government was not collaterally estopped from denying what it had stipulated in prior litigation to be the correct figure.

In support of this contention, taxpayers cite *Fairmount Aluminum Co. v. Commissioner*, 222 F. 2d 622, 625 (4th Cir., 1955), cert. den. 350 U. S. 838 (1955), where the court held that "certainly a judgment on an agreed statement of facts is a judgment on the merits, just as is a judgment on the pleadings". And the Supreme Court in *Commissioner v. Sunnen*, 333 U. S. 591, 601 (1948), has stated that "where a question of fact essential to the judgment is actually litigated and determined in the first tax proceeding, the parties are bound by that determination in a subsequent proceeding even though the cause of action is different."

The Government's sole argument in opposition to taxpayers' contention is that, in other criminal proceedings, courts have held that determination of the exact amount of a taxpayer's income was not essential to the conviction. Accordingly, the Government contends that the amount in this stipulation was not an "essential" fact and therefore they are not collaterally estopped from altering this figure in subsequent litigation.

While this may well be true in cases where the Government chooses not to state specifically the amount of a taxpayer's net taxable income, the case at bar presents a very different problem. The rule is clear that some tax defi-

ciency must be proven to sustain a conviction. Here the only proof was of an exact amount, in total and not in detail, so that if this proof is taken out as non-essential, there was no proof. Here the Government elected to stipulate the exact figure that it had determined as representing the taxpayers' net taxable income for the years in question. Since there was no other proof, this amount was an essential fact in order to sustain the conviction.

If the Government had chosen to represent a taxpayer's income as "not less than" a stated amount, it, of course, would not be bound to *any specific* figure in subsequent litigation as no specific figure could be termed "essential" to the conviction, the necessary fact being that the taxpayer's income was "not less than" a certain amount. And by the same standard, if the Government elects unequivocably to establish a taxpayer's net income as a precise figure, this would be an essential element to the conviction, and it should be bound to that figure. In other words, to say that the establishment of the exact income figure is not requisite to a criminal conviction hardly contributes to the analysis of a situation where the exact figure has been conclusively established.

Obviously, there can be only one true taxable income of a taxpayer for any stated period of time, and taxpayers relying on the doctrine of *Commissioner v. Sunnen, supra,* assert that these facts, having once been conclusively determined by a Court of competent jurisdiction, cannot be later discarded and re-litigated.

II

THE DOCTRINE OF COLLATERAL ESTOPPEL SHOULD NOT BE LIMITED SO AS TO BIND A TAXPAYER TO LIABILITY FOR CIVIL PENALTIES FOR "FRAUD" BECAUSE OF HIS PRIOR CONVICTION OF "ATTEMPTING TO EVADE OR DEFEAT A TAX", THE TWO STATUTES NOT BEING IN *PARI MATERIA*, AS DETERMINED BY THIS HONORABLE COURT.

The language employed in Section 6653(b) of the Internal Revenue Code is totally different from that of Section 7210—a fact which, by itself, is sufficient reason for not applying the principle of collateral estoppel. In *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948), the Supreme Court stated that "It [collateral estoppel] must be confined to situations where the matter raised in the second suit is *identical in all respects* with that decided in the first proceeding and where the controlling facts and *applicable legal rules* remain unchanged" (emphasis and brackets supplied). It is obvious on the face of the two statutes that the words "willfully attempts in *any manner* to evade or *defeat any tax imposed*" do not necessarily imply the existence of "any *underpayment* of tax *due to fraud*" (emphasis supplied). This position has been confirmed by the Supreme Court in *United States v. Scharton*, 285 U.S. 518 (1932), where the Court held that those statutes did not have the exact same meaning, and therefore a conviction under the criminal statute would not automatically lead to civil liability.

In addition to the fact that the two statutes in question could in no sense be termed identical, courts prior to this unwarranted extension of the boundaries of collateral estoppel have held that the doctrine is not applicable be-

tween a criminal conviction and a civil case. In *United States v. Glidden Co.*, 119 F. 2d 235, 244-245 (6th Cir. 1941), the Court stated that "A former adjudication in a criminal action is not generally a bar to a subsequent civil action, because of the different object of the proceedings and their dissimilarity in parties, rules of decision, and procedure . . .", and in *Stagecrafter's Club, Inc., v. District of Columbia Division of American Legion*, 111 F. Supp. 127 (D.D.C. 1953), the court held that a prior criminal conviction could be admitted only as *prima facie* evidence of an alleged unlawful act in a subsequent trial, which the convicted party would have an opportunity to rebut.

The injustice of applying Collateral Estoppel to the present situation is readily apparent on the face of the modified decision of the Court of Appeals. In order that the taxpayer's wife, who will be held liable for any penalties due on the joint return (see *Ginsberg's Estate v. Commissioner*, 271 F. 2d 511 (5th Cir. 1959)), might be assured of her "day in court," as the principles of Due Process command, the case as to her was remanded to the District Court where she will be permitted to contest the issue of her husband's fraud.

And if Mrs. Moore is successful in the subsequent trial in overcoming the evidence of her husband's criminal conviction, which is indeed conceivable, and has been aptly demonstrated in the past (see *William Hendrick*, 1961-308 T. C. Memo; *Leroy B. Williams*, 1955-325 T. C. Memo) the parties will be left in a very incongruous position, whereby a taxpayer will have been found liable for penalties arising out of the same charges for which his wife, who is jointly liable for the penalties, has been found not liable.

In other words, Mrs. Moore will have vindicated her husband of the civil charges against him, but he will not

be permitted to avail himself of this vindication. The court in *Armstrong v. United States*, 354 F.2d 274, 290 (1965) stated that, "the doctrine [collateral estoppel] rests not only on the desire to avoid repetitious trials, but just as firmly on *the need to avoid conflicting judicial decisions*" (emphasis and brackets supplied). By stretching the boundaries of collateral estoppel to fit the case at bar, the Court of Appeals seems to have achieved exactly what the doctrine was intended to prevent—*conflicting judicial decisions*.

This unjust situation is only one of the several inequities presented by this unwarranted extension of the doctrine of collateral estoppel. It is clear that, if the taxpayer were *acquitted* in the prior criminal case, the Government would not be prevented from pressing separately for civil penalties (*Helvering v. Mitchell*, 303 U.S. 391 (1938)); however, in light of the Court of Appeals decision, the taxpayer is to be prevented from contesting the issue of the civil consequences of his *conviction* in a prior criminal case. This obviously gives the Government the benefit of a "one-way street" whereby it is basically unaffected by the prior criminal proceeding and the taxpayer is virtually bound to it.

In addition, by further expanding the doctrine of collateral estoppel, the criminally convicted taxpayer for all practical purposes, will be precluded from any choice of forum for the litigation of his civil tax liabilities. Normally a taxpayer may elect to litigate his liability for a civil addition (penalty) in either the Tax Court, the Court of Claims, or a federal district court; his choice depending on various factors such as financial resources, or desirability of expert fact-finding. However, under the extended boundaries of collateral estoppel proposed by the Government and accepted by the Court of Appeals, any choice of forum will be in fact meaningless as the tax-

payer will be relegated to the District Court's determination on the issue of fraud in the prior criminal proceeding.

In addition to the injustices which may injure the taxpayer, any benefits which would normally be afforded the court from the application of collateral estoppel are noticeably absent when the doctrine is expanded to the limits determined by the Government. For example, the application of the doctrine to a civil action following a criminal proceeding will not necessarily limit the amount of litigation. In each of those numerous instances where the convicted taxpayer had filed a joint return, the spouse, who will also be liable for any civil penalties, must be permitted to contest the issue of the taxpayer's fraud in a collateral action. And, as has been shown, this action can in fact increase, rather than reduce, the possibility of conflicting judicial decisions.

Essentially, the basic issue before the court on this point has been stated by Judge Mulrony in his concurring opinion in *Amos v. Commissioner*, 43 T.C. 50 (1964): Are the well-defined boundaries of collateral estoppel to be extended? Noting the harsh inequities placed on the taxpayer and the clear lack of any measurable benefits created by the expansion of the doctrine, the answer to this inquiry must certainly be made in the negative.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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APPENDIX A

OPINION OF THE DISTRICT COURT

(Caption Omitted)

OPINION

This is an action by the plaintiff taxpayers for the refund of what they allege were certain overpayments of federal income taxes made by them for the calendar years 1955-1958. The government has counterclaimed alleging fraud under 26 U.S.C. § 6653(b) and praying for payment of all unpaid taxes and interest plus the 50 percent penalty for fraud allowed under § 6653(b).

Both sides are relying on what they consider the favorable effect on this case of a previous criminal conviction of Mr. Moore under 26 U.S.C. § 7201.[1] The plaintiffs allege that a stipulation of the amount of their taxable income for the years in question entered into by the parties in the criminal action is binding on the parties for all purposes, and they compute their claim for refund from the amount of taxable income stipulated *in the former* suit. The government, of course, contends that the stipulation related only to the criminal action and cannot be used collaterally to estop[2] the offering of proof in this civil suit of an amount of taxable income considerably

1. "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

2. Since the causes of action in the two suits are wholly different, the doctrine of collateral estoppel (sometimes called estoppel by judgment or estoppel by verdict) is the proper vehicle for the relief sought by both parties rather than classic res adjudicata which applies only to cases in which the causes of action are identical. *Commissioner* v. *Sunnen*, 333 U.S. 591, 598 (1947); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1 (1942).

higher than the amount stipulated in the former adjudication. In addition the government in its counterclaim in this action contends that the criminal conviction under 26 U.S.C. § 7201 conclusively establishes the existence of fraud within the meaning of 26 U.S.C. § 6653(b),[3] and collaterally estops the plaintiffs from offering proof on the fraud issue. The plaintiffs of course deny that the criminal conviction has any such legal effect.

Both parties rely so heavily on their respective collateral estoppel arguments that they are willing to stand or fall on them and have agreed not to introduce any further evidence on the points at issue.[4]

Before entering into a detailed discussion of the two issues in this case I must note that the former adjudication upon which both sides rely as the source of collateral estoppel was a criminal prosecution of Mr. Jerome Moore *only*. His wife Mildred was not a party to that prosecution and it is difficult for me to see despite the comments found in *Lefkowitz* v. *Tomlinson*, 11 A.F.T.R. 2d 617 (S.D. Fla. 1962), how she could be collaterally estopped from defending herself against a charge of fraud by a former suit to which she was not even a party. I likewise believe that since she did not enter into, and was

3. "(b) Fraud.—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment."

4. At page 1 of the plaintiffs' brief the following statement appears: "At the hearing the parties will designate for admission into evidence certain material to constitute the record. No other evidence is to be introduced." At page 8 of the government's brief the following footnote is found: "This case is being submitted to the Court by submission of briefs and argument. The principal documents relevant to the issues involved are attached to the Complaint and Counterclaim. In addition, the parties have agreed that the transcript of the prior criminal case may be referred to by either party. A brief stipulation of facts has been agreed upon, and is attached hereto as Appendix A, *infra*. The parties do not intend to call any witnesses. Rather, each party will rely upon the material referred to in this footnote."

therefore not bound by the stipulation in the former suit the doctrine of mutuality should relieve the government from being held to its stipulation as to her, even if it were proper to hold the government to its stipulation as to Mr. Moore. *Elder* v. *New York & Pa. Motor Express, Inc.*, 284 N.Y. 350, 31 N.E. 2d 188 (1940). However, there is authority which indicates that Mrs. Moore should be bound by the prior adjudication because she filed a joint return with her husband. See *Ginsberg's Estate* v. *Commissioner*, 271 F. 2d 511 (5th Cir. 1959); *Boyett* v. *Commissioner*, 204 F. 2d 205, 209 (5th Cir. 1953), 26 U.S.C. § 6013(d)(3). I do not give this matter any more serious consideration because in my view the doctrine of collateral estoppel would not be properly applicable to either of the issues in this case, even if the parties in both suits were the same. I reach this conclusion for the following reasons:

1) *The Stipulation issue. Both parties to* this suit have agreed that a proper definition of collateral estoppel can be found at p. 601 of *Commissioner* v. *Sunnen*, 333 U.S. 591 (1947), where the court states:

> ". . . where a question of fact *essential to the judgment* is *actually litigated* and determined in the first tax proceeding, the parties are bound in a subsequent proceeding even though the cause of action is different." (Emphasis added.)

On the question of whether a factual issue is "actually litigated" when the parties to a lawsuit enter into a stipulation as to its truth there seems to be no clear cut authority. The Restatement of Judgments, § 68 Comment h, indicates the difficulty of this question:

> "Effect of stipulation. If a question of fact is put in issue by the pleadings, and the parties enter into a stipulation as to the truth of the fact, *it is a question of the*

interpretation of the stipulation whether it is binding on the parties only with reference to the particular cause of action sued upon, or whether it is binding in subsequent actions between them based upon different causes of action." (Emphasis added.)

In interpreting this particular stipulation the plaintiffs contend that its language [5] is completely unqualified and was not meant to be limited to the criminal case but was simply an "agreed statement of facts." The government emphasizes the phrase "as evidence in this case" and points to remarks of Judge Dalton which the government contends demonstrate that the stipulation was not viewed by the trial judge as representing a final and complete computation of the plaintiffs' net taxable income.[6] This problem would not have arisen had the stipulation contained express and unequivocal words of limitation. However, in my opinion the most that can be said for the language of the stipulation is that it is ambiguous regarding the limitations to be put on its use. And were it necessary for me to base my decision on a resolution of this ambiguity I would be hard put to decide the issue.

Fortunately, however, even assuming that the stipulation was "actually litigated," the requirement that the issue in the former suit must have been "essential to the

5. The pertinent part of the stipulation reads: "The undersigned . . . (counsel for the government and Mr. Moore) in the above styled case now pending in the United States District Court for the Western District of Virginia, Roanoke Division, do hereby tender the following stipulation of facts and move this Honorable Court that *the same be accepted as agreed statement of fact and as evidence in this case." (Emphasis added).* There follows a listing of Mr. and Mrs. Moore's net taxable income for the years in question.

6. Judge Dalton stated at p. 76 of the criminal transcript that "Another condition of the probation is that you, as soon as the computations are made, pay all taxes and assessments and penalties that the government may find to be due by you." He made other remarks in the same vein at other points during the trial. See p. 78 of the criminal transcript.

judgment" clearly defeats the plaintiffs' contention regarding this issue. For a conviction under 26 U.S.C. § 7201 does not require the proving of any definite sum of taxable income beyond a substantial amount. In drawing up the stipulation of taxable income it is conceded by both sides that the government purposely included *only* income items which were allegedly completely omitted from the taxpayers' original returns.[7] The government did not in the criminal case stipulation, as it has in the deficiency assessments in this case, increase the taxpayers' net taxable income by restoring to it certain allegedly non-allowable deductions, by treating certain income as ordinary income instead of capital gain or by charging to income certain claimed credits of interest.[8] And the reason for those omissions is clear: It was the opinion of the government that total omission by the taxpayers of certain items of their income tended to demonstrate more convincingly that Mr. Moore had "willfully attempted . . . to evade or defeat" the payment of his income tax than the other items which might have been considered honest mistakes. And since the totally omitted items aggregated a substantial sum, which is all that is required for conviction under § 7201, there was no good reason for the government to add the other items where the element of "willfulness" would be more difficult to prove beyond a reasonable doubt.

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7. These stipulated amounts were:

1955	$21,527.35
1956	26,749.36
1957	26,250.01
1958	36,212.81

8. The amounts of taxable income alleged by the government in this case are:

1955	$23,933.61
1956	35,316.44
1957	40,586.77
1958	42,164.27

As stated in the Restatement of Judgments § 68, Comment o, "where the jury or the court makes findings of fact but the judgment is not dependent upon these findings, they are not conclusive between the parties in a subsequent action based upon a different cause of action." A particular precise amount of taxable income for the years in question was not an essential element in the criminal conviction of Mr. Moore. Proving any substantial amount would have been sufficient for conviction when coupled with the willful evasion element of § 7201. For this reason I believe the government should not be bound by the stipulation. See also *Kiar* v. *United States*, 69 F. Supp. 406 (Ct. Cls. 1947); *Cumbria* v. *Jeffery*, 307 Mass. 49, 29 N.E. 2d 555 (1940).

Additionally it appears to me that even if one accepts the plaintiffs' position that the finding of the exact amount of the taxpayers' taxable income was necessary for a conviction under § 7201, that finding could only be considered a mediate or evidentiary finding since the court or jury would then have to determine if that exact amount was substantial enough under the existing circumstances to meet the requirements for conviction under § 7201. And of course the finding of such mediate or evidentiary facts does not bar reconsideration of them in a subsequent suit. *Hyman* v. *Regenstein*, 258 F. 2d 502 (5th Cir. 1958); *Evergreens* v. *Nunan*, 141 F. 2d 927 (2d Cir. 1944); Restatement, Judgments § 68, Comment p. (Supp. 1948).

For the foregoing reasons I must conclude that the government is not collaterally estopped from offering proof in this action of the plaintiffs' taxable income for the years in question.

2) *The fraud issue.* In *United States* v. *Scharton*, 285 U.S. 518 (1932), the taxpayer was indicted under an identically worded predecessor of 26 U.S.C. § 7201 more than three years after the alleged offense occurred. At

that time the applicable statute of limitations barred all prosecutions under the internal revenue laws brought more than three years after the alleged offense, "(p)rovided, That for offenses involving the defrauding or attempting to defraud the United States . . . in any manner, the period of limitation shall be six years . . ." See 285 U.S. at 520. The government argued in that case, just as it does here, that "'evasion' implies avoidance by device or strategy or concealment where good faith requires disclosure . . . and 'intent to defeat' is equivalent to 'intent to defraud'" and stated further that "(t)he courts have continuously treated any attempt to evade or defeat a tax as an offense involving fraud." See 285 U.S. at 519.

However, the Supreme Court rejected the government's contention and held that the prosecution was barred by the three year statute of limitations because it did not necessarily involve fraud. At 285 U.S. 521 the court stated:

> "There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against the revenue laws. Under these, an indictment failing to aver that intent would be defective; *but under* § 1114(b) (predecessor of § 7201) *such an averment would be surplusage, for it would be sufficient to plead and prove a wilful attempt to evade or defeat.*" (Bracketed material and emphasis added)

In reaching this conclusion the Court in *Scharton* put some emphasis on the need to construe the excepting clause of the statute of limitations narrowly. However, this emphasis provides no distinction from the case at bar since there is at least an equal need to interpret the doctrine of collateral estoppel narrowly to protect a liti-

gant from being unfairly foreclosed from presenting proof on an issue which affects his rights. Therefore it appears to me that the *Scharton* case represents a holding precisely on the point at issue in this case.

Moreover, the Tax Court has refused to apply the doctrine of collateral estoppel in the same circumstances as this case presents. *Safra* v. *Commissioner,* 30 T.C. 1026 (1958). The government attempts to discredit the Tax Court's holding by arguing that it erroneously relies on *Helvering* v. *Mitchell,* 303 U.S. 391 (1938), which held that a civil action brought by the government to recover the 50 per cent fraud penalty was not barred by acquittal in a criminal prosecution for a willful attempt to evade or defeat payment of taxes because the burden of proof was lighter in the civil action and no double jeopardy was involved. While it may be true that the Court did not rest its decision on the different elements in the statutes, the difference was nonetheless pointed up in the opinion at p. 398 and the *Scharton* case was cited therein. Such reference can only be taken as indications of the Supreme Court's approval of the *Scharton* analysis. And such approval does justify the Tax Court's holding in *Safra* v. *Commissioner, supra.*

In the face of the impressive authority cited above, only one case directly supports the government's position. *Lefkowitz* v. *Tomlinson,* decided by the Fifth Circuit Court of Appeals on July 13, 1964 and not yet generally reported (the decision below will be found in 11 A.F.T.R. 2d 617 (1962)), holds that a criminal conviction under the 1939 Code predecessor of § 7201 collaterally estopped the taxpayers from litigating the fraud issue in a civil prosecution based on the predecessor of § 6653(b). The *Lefkowitz* opinion attempts to distinguish *Scharton* v. *United States, supra* on the grounds, men-

tioned and rejected above, that the court in *Scharton* held that the statute there involved was to be strictly construed. And the cases relied on in *Lefkowitz* do not deal with the statutes involved in this case. Indeed in two of the three cases upon which the *Lefkowitz* decision rests the criminal and civil statutes were identically worded, thus completely eliminating the problem involved in *Lefkowitz* and the case at bar. See *United States* v. *Salvatore,* 140 F. Supp. 470, (E.D.Pa. 1956) and *Local Teamsters Union* v. *United States,* 291 U.S. 293 (1933). And the third case, *O'Neill* v. *United States,* 198 F. Supp. 367 (E.D.N.Y. 1961), involved the dismissal of a suit for refund of the cost of an occupational stamp tax imposed on persons engaged in the business of accepting wagers based on the plaintiff's prior criminal conviction of accepting wagers, clearly a very different situation from the one at bar. I am therefore of the opinion that the *Scharton* case is much more closely in point than the *Lefkowitz* case and I am therefore disposed to follow the former.

Nor am I persuaded by *Spies* v. *United States,* 317 U.S. 492 (1943), another case on which the government places much emphasis. That case seems to conclude that a willful commission of some kind, and not merely a willful omission, is necessary to support a conviction under the predecessor of § 7201, which is characterized as the "climax" of all the various civil and criminal sanctions against offenders of the tax laws. However, nowhere does the court expressly state that a willful commission must involve fraud. Neither does the court overrule or discredit *Scharton.* Therefore I conclude that the *Spies* case should not affect my holding in the case at bar.

Under the authority stated above, I hold that the plaintiff is not foreclosed by collateral estoppel from

contesting the fraud issue raised by the government's counterclaim under 26 U.S.C. § 6653(b). Since the burden of proving fraud is on the government, *United States* v. *Thompson*, 279 F.2d 165 (10th Cir. 1960), and since the only proof to be offered is the prior criminal conviction, which I do not consider sufficient standing alone to make out a case for the government, it follows that the government's counterclaim insofar as it depends on proof of fraud must fail.

An order will be entered in accordance with this opinion.

S/ THOMAS J. MICHIE
United States District Judge

APPENDIX B

JUDGMENT OF DISTRICT COURT

(Caption Omitted)

JUDGMENT

This cause came on to be tried before the Court without a jury; and the Court, having considered the pleadings, stipulation of facts and briefs on file herein and the argument of counsel, issued its Memorandum of Opinion filed herein on August 7, 1964; and for the reasons set forth in said Memorandum of Opinion, it is accordingly

ORDERED that the plaintiffs, Jerome H. Moore and Mildred V. Moore, do not recover of the defendant on their complaint and judgment thereon is hereby entered for the defendant; and it is further

ORDERED that the defendant, United States of America, does not recover of the plaintiffs, Jerome H. Moore and Mildred V. Moore, on its counterclaim and judgment thereon is hereby entered for the plaintiffs.

Signed and Entered on this 10th day of November, 1964.

S/ THOMAS J. MICHIE
United States District Judge

S/THOMAS B. MASON

APPENDIX C

ORIGINAL OPINION OF THE COURT OF APPEALS

(Caption Omitted)

SOBELOFF, Circuit Judge:

The principal question before us is whether a criminal conviction for tax evasion works a collateral estoppel on the issue of fraud in a subsequent civil suit over a fraud penalty.

The point arises in a suit for refund filed by Mr. and Mrs. Jerome H. Moore for taxes paid in 1960 for the years 1955-58. The Commissioner filed a counterclaim for additional taxes and fraud penalties assessed pursuant to 26 U.S.C.A. § 6653(b)[1] for the tax years in question. The only evidence offered by the Commissioner in support of the fraud assessment was the 1961 criminal conviction of Jerome Moore, after his plea of not guilty and trial, for willfully attempting to evade and defeat the payment of income taxes for the years in question in violation of 26 U.S.C.A. § 7201.[2] The Government took the position that the existence of fraud was necessarily determined in the prior criminal trial in which Moore was convicted. The District Court rejected this contention, holding that despite the prior criminal conviction the issue of fraud was

1. 26 U.S.C.A. § 6653—Failure to Pay Tax—

"(b) *Fraud.*—If any part of any underpayment * * * of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment."

2. 26 U.S.C.A. § 7201—Attempt to Evade or Defeat Tax—

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

not foreclosed in the civil proceeding. We are compelled to a different view.

An answer was recently given by the Fifth Circuit to the identical legal issue presented here. It held that fraud is a necessary element in a criminal conviction for evasion, and that the earlier conviction supplies the basis for a finding of fraud in the civil proceeding to determine tax liability. *Tomlinson* v. *Lefkowitz*, 334 F.2d 262 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965).[3] We adopt, without repetition, Judge Tuttle's opinion in that case.

Though the evasion statute does not in terms require a finding of fraud, we can recall no case in our experience where, accepting the truth of the facts leading to conviction for evasion, one could say that there was not sufficient proof for a finding of fraud in the civil case. In fact, the taxpayers in the argument of this case have been unable to hypothesize a case contrary to this experience. The practicalities, as we have observed them, are dictated by the nature of the definition given to the respective provisions by the courts. Repeatedly it has been held that civil fraud is not committed when an understatement of income or an overstatement of deductions is due to "inadvertence, negligence or honest errors." See, *e.g.*, *Archer* v. *Commissioner*, 227 F.2d 270, 274 (5th Cir. 1955). To constitute civil fraud it must be shown that there was conduct variously described as being "evil," "in bad faith," "deliberate and not accidental," or "wilful." Balter, *Tax Fraud and Evasion* 2.2 (1963). The criminal evasion statute specifically turns on "willfulness," one of the terms used to define civil fraud, and "willfulness" in turn is described in evasion cases as acting

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3. The position taken in this opinion has been recently described as the "sounder view" in 10 Mertens, *Federal Income Taxation*, § 60.26, n.21.2 (1965 Supp.).

"with a bad heart, and a bad intent; it means having the purpose to cheat or defraud * * *. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent, or grossly negligent." *Gaunt* v. *United States*, 184 F.2d 284, 291 n.4 (1st Cir. 1950), *cert. denied*, 340 U.S. 917 (1951). See *Wardlaw* v. *United States*, 203 F.2d 884 (5th Cir. 1953).

Several opinions, while not addressed specifically to the relationship of a conviction for criminal evasion to civil fraud, have stated that to satisfy the Government's burden of proof in a criminal evasion case, it must show an "attempt wilfully to defraud." *United States* v. *Schenck*, 126 F.2d 702, 704 (2d Cir.), *cert. denied*, 316 U.S. 705 (1942). An illustrative opinion uses this language:

"The real character of the offense lies * * * in the attempt to defraud the government by evading the tax." *Gariepy* v. *United States*, 220 F.2d 252, 259 (6th Cir.), *cert. denied*, 350 U.S. 825 (1955).

The only difference that has been discovered, in theory or practice, between the constituent elements of the two statutes is the larger quantum of proof required in a criminal evasion case:

"A civil case ripens into a criminal case when it has that elusive but additional ingredient of insidiousness that enables the government to prove its case beyond a reasonable doubt. In this respect, every civil evasion case may be considered as one that never fully ripened into a crime, and every criminal case as one that was too insidious to be disposed of on a purely civil level." Beck, *When Avoidance: When Evasion*, 18 N.Y.U. Inst. on Fed. Taxation 1093, 1104-05 (1960). See Balter, *Tax Fraud and Evasion* 2.2

(1963); Gutkin, *Tax Law Violations and Enforcements; The Handling of Penalty Cases*, 6 N.Y.U. Inst. on Fed. Taxation 189, 202 (1948).

Thus, while the criminal evasion statute does not explicitly require a finding of fraud, the case-by-case process of construction of the civil and criminal tax provisions has demonstrated that their constituent elements are identical.

The decision in *United States* v. *Scharton*, 285 U.S. 518 (1932), does not militate against the above analysis. There the taxpayer was indicted for criminal evasion more than three years after the tax year in question. The statute then in force provided for a three-year period of limitations for "offenses arising under the internal revenue laws * * *." The Government argued that the statutory exception "for offenses involving defrauding * * * the United States * * *" was applicable, in which case the applicable limitation period would have been six years. The Court affirmed a dismissal of the prosecution, holding that since a statute of repose must be narrowly construed the six-year exception could be applied only to those offenses where the indictment must specifically aver an intent to defraud. Thus the Court did not hold that fraud was not a constituent element of criminal evasion; rather, it merely held that the longer period of limitations was applicable to offenses in which the statute explicitly referred to fraud. Even this narrow holding was drawn into question in a later case that gave a more expansive reading to a similar statute providing a longer period of limitations in respect to violations involving an intent to defraud. *United States* v. *Grainger*, 346 U.S. 235 (1953).[4]

4. "We believe that Congress sought by its phrase 'involving fraud * * * in any manner' to make the * * * Act applicable to offenses which are fairly identifiable as those in which fraud is an essential ingredigent, by whatever words they be defined,

We reject as without substance the argument that the application of the doctrine of collateral estoppel deprives the taxpayer of his right to judicial review. The rationale of the doctrine of estoppel by judgment is that a competent tribunal has already given the question at issue full judicial review. Furthermore, the first proceeding being criminal in nature, it follows that the burden of proof met by the Government there was more exacting than that required of it in this civil case.

We therefore hold that this taxpayer is collaterally estopped to deny that he was guilty of fraud during the years in question. This estoppel applies to Mrs. Moore also even though she was not a party to the criminal action, since she signed the joint returns involved in the fraud. *Ginsberg's Estate* v. *Commissioner*, 271 F.2d 511 (5th Cir. 1959).

The taxpayer, in turn, contended in the District Court that the Government itself was collaterally estopped from redetermining the amount of taxes owed for the years in question, since it had stipulated in the earlier criminal proceeding the exact amount owed. The District Judge ruled that the Government was not estopped because the determination of an exact liability was not "essential to the judgment," a prerequisite to the application of the doctrine of collateral estoppel. *Commissioner* v. *Sunnen*, 333 U.S. 591, 601 (1948). With this ruling we agree. As stated by the District Judge, "a conviction under 26 U.S.C.A. § 7201 does not require the proving of any definite sum of taxable income beyond a substantial

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and that Congress did not seek to limit its applicability to such of those identifiable offenses as also are labeled with a particular symbol." *Grainger*, at 244.

In addition, the Court six years after the *Scharton* opinion indicated that the question of whether fraud was a constituent element of criminal evasion was still moot. Helvering v. Mitchell, 303 U.S. 391, 398 (1938).

amount." *Moore* v. *United States*, 235 F. Supp. 387, 391 (W.D. Va. 1964). There is therefore no basis here for the application of the estoppel doctrine against the Government in respect to the amount of taxes due.

Affirmed in part and reversed in part.

APPENDIX D

JUDGMENT OF COURT OF APPEALS

(Caption Omitted)

JUDGMENT

Appeal from the United States District Court for the Western District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of Virginia, at Charlottesville, for further proceedings not inconsistent with the opinion of the Court filed herein.

December 7, 1965.

SIMON E. SOBELOFF
United States Circuit Judge.

APPENDIX E

SUPPLEMENTAL OPINION OF COURT OF APPEALS

(Caption Omitted)

SOBELOFF, Circuit Judge:

Jerome H. Moore and his wife, Mildred V. Moore, filed joint income tax returns for the years 1955-1958. In 1961 the husband was convicted after trial, pursuant to 26 U.S.C.A. § 7201, for willful evasion of taxes in those years. Subsequently a fraud assessment was made against both taxpayers pursuant to 26 U.S.C.A. § 6653(b), and when they sued in the District Court for a refund of certain taxes paid, the Government counterclaimed for the unpaid fraud penalties. In our original opinion, issued December 7, 1965, we agreed with the Government's contention that the existence of fraud on Mr. Moore's part was necessarily determined in his prior criminal trial and that as to him the issue of fraud was therefore foreclosed in the civil proceeding, adopting the view of the Fifth Circuit in *Tomlinson* v. *Lefkowitz*, 334 F.2d 262 (1964), *cert. denied*, 379 U.S. 962 (1965). As to Mrs. Moore, we expressly held that the collateral estoppel applied to her as well, even though she was not a party to the criminal proceeding, since she signed the joint returns involved in the fraud.

In the briefs and oral arguments the taxpayers failed to raise any contention that Mrs. Moore should be accorded treatment different from her husband. They, and the Government too, apparently assumed that if the conviction worked an estoppel against the husband on the fraud issue, the wife was equally estopped because of her signature on the joint returns, despite the fact that she was not a defendant in the criminal case.

Upon further consideration, however, we recalled our

mandate to the District Court as it related to Mrs. Moore, suggesting that perhaps she should be allowed to litigate the question of Mr. Moore's fraud if she so desires; although for the reasons stated in the original opinion, we remained of the view that the husband is estopped by his conviction in the criminal case from contesting the finding of fraud on his part.[1] We requested briefs from both sides as to the wife's right to contest the husband's fraud.

We adhere to the view that the wife becomes liable for all additional taxes, including penalties for fraud, if she has signed a fraudulent joint return, regardless of a lack of fraudulent intent on her part. The "joint and several" liability is expressly imposed by 26 U.S.C.A. § 6013(b)-(5) and (d)(3). *Ginsberg's Estate* v. *Commissioner*, 271 F.2d 511 (5th Cir. 1959); *Kann* v. *Commissioner*, 210 F.2d 247, 252 (3d Cir. 1953); *Howell* v. *Commissioner*, 175 F.2d 240 (6th Cir. 1949). Compare *Spanos* v. *United States*, 323 F.2d 108 (4th Cir. 1962); *Cirillo* v. *Commissioner*, 314 F.2d 478 (3d Cir. 1963); *Payne* v. *Commissioner*, 247 F.2d 481, 483-84 (8th Cir. 1957).

We conclude, however, that the wife, who was not a party to the criminal proceeding, should not be estopped by the finding of fraud against her husband and that the case should be remanded to the District Court, where she will be permitted to litigate the question of her husband's fraud in the preparation of the joint returns. On remand, the Government will have the burden of establishing the husband's fraud, without reliance on his criminal conviction. If the Government meets its burden, the wife will become jointly liable with her husband for the additional taxes and penalties. Section 6013(b)(5) and

1. We also recalled our mandate as it related to Mr. Moore, so as to preserve the opportunity for the taxpayers later to file consolidated petitions to the Supreme Court for a writ of certiorari, if that should become necessary.

(d)(3). But she is not precluded by his conviction from contesting the issue of her husband's fraud. To this extent our original opinion is modified.

We are mindful of what may be a contrary position taken by the Tax Court in *Thomas Worcester, Inc.* v. *Commissioner,* P-H Memo T.C. par. 65,199 (1965). There the court stated that:

> "Even if we were to agree with Elizabeth [the wife] that she is not collaterally estopped by the prior criminal conviction of Thomas [her husband] to deny fraud in the instant case, her liability on the fraud issue (being joint and several) would still be controlled by a finding of fraud against Thomas. In other words, it would be completely meaningless, where a joint return has been filed, to reach contradictory results on an issue of fraud." (p. 1122)

We agree that Mrs. Moore's joint liability with her husband arises not from her personal fraud, but from that of her husband, but for a finding of fraud on his part to bind her, it must be made in a proceeding to which she is a party. This requirement cannot be satisfied by invoking the estoppel which Mr. Moore's prior criminal conviction works against him, for Mrs. Moore was not a party to the criminal proceeding. Due process requires that she be accorded her day in court on the issue of her husband's fraud. Her right in the civil proceeding to contest her husband's fraud may not be denied by pointing to her husband's prior criminal conviction, nor should his conviction prejudice her position in the civil proceeding.

Our original decision is modified as above indicated, and the case is remanded as to Mrs. Moore for further proceedings not inconsistent with this opinion.

APPENDIX F

JUDGMENT OF COURT OF APPEALS BASED ON SUPPLEMENTAL OPINION

(Caption Omitted)

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and upon the supplemental briefs filed by counsel for the parties.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged that the opinion of this Court filed herein on December 7, 1965, be, and it is hereby, modified as set forth in the opinion this day filed herein; and this cause, as it relates to Mrs. Mildred V. Moore, be, and it is hereby, remanded to the United States District Court for the Western District of Virginia, at Charlottesville, for further proceedings not inconsistent with the opinion of the Court as so modified.

SIMON E. SOBELOFF
United States Circuit Judge.

FILED
APR 29 1966
MAURICE S. DEAN
Clerk

APPENDIX G

MODIFYING JUDGMENT OF COURT OF APPEALS

(Caption Omitted)

Upon consideration of the petition of counsel for the appellants for a clarification of the mandate,

It is ordered that the second paragraph of the judgment filed herein April 29, 1966, be amended so as to read as follows:

> ON CONSIDERATION WHEREOF, It is now here ordered and adjudged that the opinion of the Court filed herein on December 7, 1965, be, and it is hereby, modified as set forth in the opinion this day filed herein; and that this cause be, and it is hereby, remanded to the United States District Court for the Western District of Virginia, at Charlottesville, for further proceedings as to Mrs. Mildred V. Moore, not inconsistent with the opinion of the Court as so modified.

It is further ordered that the words "Modified and remanded" be substituted for the directive at the foot of the opinion filed herein on April 29, 1966.

SIMON E. SOBELOFF
United States Circuit Judge.

FILED
MAY 24 1966
MAURICE S. DEAN
Clerk

APPENDIX H

ORDER DENYING PETITION FOR REHEARING

(Caption Omitted)

ORDER

The court, upon due consideration of the petition for rehearing filed by the United States, hereby denies the petition.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

SIMON E. SOBELOFF
United States Circuit Judge

HERBERT S. BOREMAN
United States Circuit Judge

FILED
June 22 1966
MAURICE S. DEAN
Clerk